

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6139

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6139

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant,
and

CAMERON F. MacRAE III, as Trustee for the
Liquidation of Executive Securities Corp.,

Appellee,
against

EXECUTIVE SECURITIES CORPORATION,

Defendant.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,
against

EXECUTIVE SECURITIES CORPORATION,

Defendant,
and

RICHARD O. BERTOLI,

Defendant-Appellant

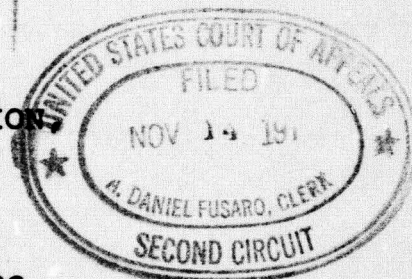
On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE TRUSTEE-APPELLEE

Of Counsel:
Eric H. Moss

Dated: November 14, 1977

LeBoeuf, Lamb, Leiby & MacRae
Attorneys for the Trustee
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New York, New York 10005



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P/S

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PRELIMINARY STATEMENT

Appellant Richard O. Bertoli ("Bertoli"), the President of Executive Securities Corp. ("Executive"), appellee's bankrupt, takes this appeal from an order of the District Court for the Southern District of New York, as a Court of Bankruptcy, which order enjoined appellant from making claim in forums other than the Bankruptcy Court to property within the Bankruptcy Court's actual or constructive possession, and which directed the Trustee to proceed forthwith to commence an action in the Bankruptcy Court to adjudge and determine appellant's claims to that property. Appellant, apparently unwilling to raise his arguments of entitlement in a forum or an action in which the Trustee may be heard to assert his title, takes this appeal claiming that, because this bankruptcy resulted from appellant's allegedly criminal acts, (for which he has been indicted and made subject to administrative proceedings for sanction), the Bankruptcy Court lacks jurisdiction over the Bankrupt's property and must yield to the criminal and administrative forums for these determinations. This brief is submitted on behalf of Cameron F. MacRae, III, the District Court's appointed Trustee, and the appellee herein.

STATEMENT OF ISSUES

1. Does the District Court, as a Court of Bankruptcy, have exclusive jurisdiction over the property of its

bankrupt and over the determination of rights with respect to property in the actual possession of its Trustee in Bankruptcy?

2. Does the Court of Bankruptcy have power to enjoin the President of its corporate bankrupt from taking actions in other forums which tend to hinder, embarrass or defeat its exclusive jurisdiction over the property of and in the actual possession of its bankrupt?

3. Is an individual who (i) is the President of a corporate bankrupt (ii) is President of numerous other corporations and dissolved corporations which have made claim against the bankrupt estate, (iii) has personally (albeit not formally) made claim to property in the Bankruptcy Court's possession and (iv) is a named and served defendant in the action in which the bankrupt's liquidation was petitioned for and ordered subject, personally, to the Bankruptcy Court's continuing and exclusive jurisdiction over that liquidation?

STATEMENT OF FACTS

For a number of years prior to February 14, 1975 Executive was a corporation engaged in business as a securities broker and dealer. Executive was registered with the Securities and Exchange Commission ("SEC") pursuant to the requirements of the Securities Exchange Act of 1934 (15 U.S.C. §78a

et seq.) and was a member of the National Association of Securities Dealers and the Boston Stock Exchange.*

On February 14, 1975 Judge Charles H. Tenney of the United States District Court for the Southern District of New York found, by order of that date, that the customers of Executive were 'in need of protection' within the terms of §5 of the Securities Investor Protection Act of 1970 (15 U.S.C. §78eee) (the "SIPA"), and entered an order directing the liquidation of the company under the provisions of that act (15 U.S.C. §78aaa et seq.). Pursuant to that order Cameron F. MacRae, III, appellee herein, was appointed Trustee for the liquidation of Executive.**

Executive had maintained offices for the transaction of business in Florida, New York and New Jersey. Appellant Bertoli, the President of Executive, maintained his office and conducted his business primarily from Executive's premises at 25 Broadway in New York City. Executive's "back-office" operations were maintained at premises which it had occupied

* Affidavit of Eric H. Moss in support of the Trustee's application for relief to the District Court, ¶2. (Hereinafter "Moss affidavit, ¶__ or Exhibit __"). Appellant brings this appeal in forma pauperis and, therefore, has not provided a printed record or appendix. All record references are to the original papers which comprise the record of the District Court, previously transmitted to this Court pursuant to Fed. R. App. Proc. 11.

** Moss affidavit, Exhibit A.

at One Exchange Place in Jersey City, New Jersey. Those premises consisted of three spaces, one on the 8th floor of the building, used for the firm's actual "back-office" operations and for holding current transaction records, one on the 3rd floor, used for other of the firm's operations and related records storage, and one, a small storage closet on the 11th floor, used for storage of records of the firm and its predecessors which records, due to their age, were not required for day-to-day operations.* The Trustee's application to the District Court which resulted in the order here appealed was made necessary by appellant's attempts, in an administrative proceeding before the SEC** to obtain rulings (contrary, in part, to prior Bankruptcy Court orders), that appellant was the occupant of that 11th floor storage closet and the owner of the broker/ dealer books and records stored therein, and that the Trustee, in granting access to those records to the investigatory staff of the SEC had violated appellant's right to privacy under the Fourth Amendment of the Constitution.

* Moss affidavit, ¶3.

** At the time of the Trustee's application to the District Court Bertoli had not yet sought "suppression" relief from the United States District Court for the District of New Jersey, wherein the criminal indictment against him is now pending.

The Dopler - Executive Merger -- Appellant's
claims to Executive's Property

On March 5, 1973 Executive had purchased all of the assets, business and known liabilities of Dopler & Co., Inc. ("Dopler"), a securities broker/dealer doing business in the New York metropolitan area. Mr. Bertoli had been Vice-president of Dopler, and, since the consideration paid to Dopler by Executive for its assets was a controlling block of Executive's common stock, Bertoli thereafter became President of Executive. Executive continued in business and continued to operate the Dopler business as its "Dopler & Co. Division." Thereafter, and despite the fact that under the sale agreement Dopler was to "wind-up and dissolve", the Dopler shell remained in existence, changing its name to DLR Securities Corp. ("DLR"), of which Mr. Bertoli is President.

The broker/dealer books and records generated by Dopler prior to March 5, 1973 and maintained by it pursuant to SEC Rule 17a-3 were thereafter stored in the 11th floor storage closet at One Exchange Place.* Now, though Bankruptcy Judge John J. Galgay of the Southern District of New York has already, in an order entered upon notice to Mr. Bertoli on July 16, 1975, found that those Dopler records were part of the

* Moss affidavit, ¶12, Exhibit K.

Estate and necessary to the liquidation of Executive,*
Mr. Bertoli claims (in numerous forums except the Bankruptcy Court) that those records do not belong to Executive (upon the grounds that they are the property of DLR, the old Dopler shell that was supposed to dissolve.)**.

Bertoli also claims in numerous forums other than the Bankruptcy Court that, though Executive had paid from its own funds all of the rental due for all of the space on the 11th, 8th and 3rd floors of One Exchange Place, Jersey City, New Jersey, and, in fact, used all of that space for its business operations, it had no leasehold interest in those premises. He claims, instead, that the true and only occupant of the 11th floor storage space was Diversified Financial Services, Inc. ("Diversified") the named lessee on the written lease covering the 8th floor premises. (Diversified, of course, existed only as a name used by Bertoli, since the corporate entity itself had been dissolved, for failure to pay state franchise taxes to its State of incorporation, prior to the commencement of the lease term.)***

* Moss affidavit, Exhibit E.

** See: Affidavit of Richard O. Bertoli to the court below. (Hereinafter "Bertoli affidavit, ¶__ or Exhibit __") and see: Moss affidavit, Exhibit C.

*** See: Moss affidavit ¶¶9, 10 and Transcript of Hearing in the District Court, August 9, 1977, at pg. 13, lines 4 to pg. 4, line 8, and pg. 20, line 17 to pg. 21, line 6.

These allegations and claims by Bertoli, allegations which, if sustained by any forum, would at the least place a cloud upon the District Court's Trustee's property interest in Executive's books, records and premises, are made by Bertoli for the sole purpose of attempting to create a personal proprietary interest in that property so as to afford him standing for the motions to suppress evidence which he makes in the various administrative and criminal forums wherein he now defends himself.

The Nature of the SEC and Criminal
Proceedings - The Motion to Suppress

On January 29, 1975 the SEC issued an order for public proceedings pursuant to Section 9(b) of the Investment Company Act of 1940 (15 U.S.C. §80a-9[b]), Section 203(f) of the Investment Advisors Act of 1940 (15 U.S.C. §80b-3[f]) and Sections 15(b) and 15A of the Securities Exchange Act of 1934 (15 U.S.C. §78o[b], 78o-3), naming Mr. Bertoli as one of the respondent's therein.* In its order the SEC alleges that

* Also named as respondents in that order for proceeding are, among others, (1) Henry Dopler, former principal of the "Dopler" predecessor of Executive; (2) Alfred B. Averell, Jr., Vice-president of Executive; (3) Catherine Bertoli, Mr. Bertoli's wife; and (4) Raydop Corporation and Freelton Investments, Ltd., two corporations controlled by Mr. Bertoli. Executive is not named as a party-respondent in that proceeding, and therefore the Trustee is not a party to that proceeding.

Mr. Bertoli, in combination with the other named respondents, has violated various provisions of the securities laws in his conduct of the business of, and his dealings with and on behalf of Fundamatic Investors, Inc., a registered investment company.* That public proceeding is presently pending before SEC Administrative Law Judge Max O. Regensteiner.

On June 20, 1977 the Grand Jury for the District of New Jersey returned a 77 count indictment against Bertoli and four other employees of Executive, charging that the defendants there violated numerous provisions of the federal mail and securities fraud statutes by conduct which alleged violations, it should be noted, led, directly, to the demise of Executive.

On June 8, 1976 Mr. Bertoli brought on a motion within the administrative proceeding seeking an order from the administrative hearing officer directing the suppression and return to him of certain books and records alleged to belong to him and his companies, and further alleged to have been illegally seized, by the SEC, from the 11th floor storage closet of the Jersey City premises occupied by Executive. In order to show his standing to bring on his suppression motion, Bertoli has argued to the Administrative Law Judge that Executive's 11th floor storage closet (which, he claims, contained

* Moss affidavit, Exhibit B.

the purloined documents) could not be entered by anyone (including the District Court's Trustee) without his permission because it was not Executive's or the Trustee's property -- that room (all of the Exchange Place offices) had not been rented by Executive he said, but was, instead, leased by a corporation, Diversified, of which Bertoli was (and is) president.* Diversified, of course, existed only as a name used by Bertoli, since it had been dissolved by the State of Delaware, its state of incorporation, for failure to pay state fr taxes, effective a month and a half before the commencement of the lease term. But, and in any event, Bertoli alleges that since he had not given his permission, as "President" of Diversified, all entries into the storage closet, by anyone, and the removal of any papers therefrom, by anyone, (including the Trustee) were in violation of his personal rights against unreasonable search and seizure.** Among the specific entries about which Mr. Bertoli appears to complain are some instances, in March through May, 1975, in which Mr. George Bunstead, an employee of a firm retained by the Trustee to assist in Executive's liquidation, after learning of the existence of the storage closet and the fact that it contained records belonging

* Moss affidavit, Exhibit C.

** Bertoli affidavit, ¶23.

to Executive, went to that storeroom to check the accuracy of the information and, thereafter, to obtain some of the Trustee's records stored therein.*

Mr. Bertoli's motion to the Administrative Law Judge is, therefore, bottomed upon his assertion that this 11th floor storage closet, used to store the records of Executive, and the rent for which was paid entirely by Executive was not the property of Executive and did not pass to the Trustee upon his appointment.** To aid him in sustaining this incredible assertion he further argues that that the brokerage firm records stored in the 11th floor storage closet did not belong to Executive. This, he says, is so since, though Executive purchased Dopler & Co. Inc.'s business it had not purchased the Dopler & Co., Inc. business records which would tell it about the business it had just bought! His motion to the Administrative Law Judge is, simply put, a request for determinations that the District Court's Trustee did not have any possessory right to the bankrupt's premises and a substantial part of its records, all in the face of the Bankruptcy Court's prior order

* On September 7, 1977 Bertoli filed a motion to suppress evidence with the District Court in New Jersey in which he raises similar issues. That motion is presently scheduled for hearing on November 29, 1977.

** All three floors of Executive's Jersey City offices were leased, nominally, in the name of Diversified. If Bertoli's claim is correct then Executive had no premises at all.

to the contrary, issued on notice to Bertoli and consequently binding upon him. The issues being presented to the administrative forum relate directly to the extent of the Trustee's estate and, therefore, to the jurisdiction of the District Court as a Court of Bankruptcy under Section 2 of the Bankruptcy Act (11 U.S.C. §11). Yet Bertoli has never made those claims in the forum of the Bankruptcy Court.

Bertoli, of course, has admitted that the resolution of his motion to suppress before the administrative forum would require a determination of the extent of the Trustee's estate. On October 29, 1976 Bertoli stated on the record in open Court in a proceeding before the District Court that he intended to subpoena District Judge Tenney to appear before Administrative Law Judge Regensteiner to testify as to the District Court's interpretation of its order of February 14, 1975 by which Executive was placed into liquidation and the Trustee appointed to his duties.* By that admission Bertoli has clearly and directly conceded that his intention in pursuing the motion to suppress before the administrative forum is one of delay, oppression and embarrassment to the District Court and its Trustee in their administration of Executive's estate. Rather than making application to the District Court or the Bankruptcy

* Moss affidavit, ¶13, Exhibit I.

Court for clarification of the meaning of their judicial acts and the extent of their Trustee's estate, he has sought to "cross appeal" those determinations to the administrative forum.

The Proceedings Below.

On August 1, 1977 the Trustee, in the exercise of his statutory duties to protect, preserve and conserve the estate of his bankrupt applied to the District Court for an order enjoining Bertoli from further contest of what is or is not the bankrupt's property before any forum except the Bankruptcy Court whose duty it is to administer Executive's estate. The Trustee's application was granted, by order dated August 25, 1977, Honorable Charles H. Tenney, J., which order (i) restrained appellant from in any way attacking, contesting, bringing into question or denying the rightful possession, by the Estate of Executive and by its Trustee, or his claiming possession or entitlement in his own behalf or on behalf of any other person or entity of any property over which Executive or the Trustee had theretofore had possession or exercised control in any forum or before any person other than the Bankruptcy Court of the Southern District of New York, and (ii) directed the Trustee to commence forthwith in the Bankruptcy Court of that District such proceeding or proceedings as might be proper

and necessary to obtain therefrom a final and binding adjudication with respect to the claims of the Trustee, on behalf of Executive, to title in and/or the rightfulness of Executive's and the Trustee's previously exercised possession and control over the property brought into question by Bertoli. It is from that order that the present appeal has been taken.

THE OPINION BELOW

Simultaneous with the filing of the order here appealed the District Court filed its memorandum opinion setting forth its reasons for the entry of its order. The Court found that both under the Bankruptcy Act, which is in general incorporated into the Securities Investor Protection Act of 1970 (15 U.S.C. §78aaa et seq.) and under the specific provisions of the SIPA it had "exclusive jurisdiction of the debtor involved and its property wherever located with the powers, to the extent consistent with the purposes of [the SIPA], of a Court of Bankruptcy." (15 U.S.C. §78eee(b)(2)), and that that exclusive jurisdiction could not be "disturbed, limited or hindered by any other Court or forum without the express consent of" the District Court.*

Judge Tenney further found that the claims of proprietary interest raised by appellant's suppression motion in

* Opinion of the District Court, dated August 25, 1977, at page 2.

the SEC administrative forum would require the Administrative Law Judge to rule upon the nature of the Trustee's interest in the Exchange Place premises and the books and records there located, an inquiry which appeared to the District Court to be within its own exclusive jurisdiction to control the estate of the debtor.* Appellant had raised to the District Court, by letter submission, the possibility that an injunction against his further contest of the issue of his proprietary interest before the administrative and criminal forums might prejudice his rights to fair trial under the Sixth Amendment of the Constitution.** Judge Tenney, balancing the possible resultant harms from a determination to either enjoin appellant's further actions in forums outside of the Bankruptcy Court or leave appellant free to collaterally attack the Bankruptcy Court's prior determinations of the extent of estate property, concluded that all harm to all parties would be avoided if, while directing appellant to cease his collateral attacks upon

* Id. at pgs. 3 and 4.

** Letter of Bertoli to the District Court dated August 16, 1977. this Court will note that appellant, in compiling and transmitting the record of the District Court has included only his letter submissions. The Trustee's counsel's response by letter dated August 19, 1977 has not been transmitted to this Court as a part of the original record herein. Appellee does not burden the Court with a formal motion to correct and complete this record, but does request leave to annex a copy of that missing letter as an appendix to this brief. (See: pg 48ff; infra.)

the Bankruptcy Court's jurisdiction, the Court also directed the Trustee to commence proceedings before the Bankruptcy Court (in which Bertoli would be a party) for a final and binding determination of the possessory issues raised by appellant. As the District Court noted in footnote 2 to its Opinion, the effect of its order of restraint would not be to prevent appellant from making suppression motions in the many legal actions in which he is now involved. Per contra, appellant would only be enjoined from taking actions and raising claims which would tend to interfere with the jurisdiction of the District Court over the Bankrupt's property. By the Court's injunction, the determinations of the Bankruptcy Court as to whether certain property belonged to the estate or to some other person or entity would not be subject to further litigation or attack in the context of suppression motions, but would, instead, form an adjudicated fact to be submitted to any Court hearing one of appellant's suppression motions. It would then be the duty of that other forum to assess that fact, as it would any other facts submitted to it, within the context of the law of "suppression", and to determine, based upon those facts, whether there had been an "illegal seizure" of property in which appellant had an interest, and, therefore, proper standing to raise his objections.

Thus, under the District Court's order all rights of all parties have been preserved and no right of any party has in any way, even in the least, been curtailed. Appellant may (and has) raised his claims to the Bankruptcy Court, the proper forum for their determination. On August 26, 1977 the Trustee complied with the District Court's direction, in its order of August 25, 1977, to commence proceeding in the Bankruptcy Court for determination of appellant's claims. Bankruptcy Judge John J. Galgay has held seven days of hearing on that complaint (in all of which Bertoli participated), and the request for relief in that action is presently sub judice with that Court. Now, after that hearing, appellant still remains free to make whatever suppression motion he may wish, to whatever forum he may wish, subject only to the restriction that in making those motions he may not collaterally attack the Bankruptcy Court's determinations of the nature and extent of estate property, actions which, in all events, he had no right to take, even before the entry of the order here appealed.

We respectfully submit that the District Court's determination on the Trustee's application is in all respects proper, and should be in all respects affirmed. The District Court has, by fashioning its order as entered clearly done justice between the parties while at the same time protecting, as it had every right and indeed obligation to do, its own

jurisdiction as a Court of Bankruptcy. That order should be affirmed.

POINT I

THE DISTRICT COURT'S ORDER OF INJUNCTION
MAY ONLY BE VACATED IF THAT COURT IS FOUND
TO HAVE THEREBY ABUSED ITS DISCRETION

The appeal in this matter is taken from an order of injunction entered, by the District Court, against appellant, pursuant to Rule 65 of the Federal Rules of Civil Procedure as adopted by and made applicable to this SIPA liquidation by Bankruptcy Rule 765. The order of injunction of the District Court was granted by it as a Court of Bankruptcy and court of equity, and the determination of whether, and to what extent to grant or deny the Trustee's request for relief was addressed to that Court's sound discretion. See: In Re Tel-a-Sign, Inc., 415 F.2d 1334 (7th Cir. 1969). This Court may review the District Court's order of injunction, but, by the very nature of the relief contained therein, may only vacate that order if it finds it to have been granted out of such improvidence that it amounts to an abuse of that Court's discretion.

"The balancing of ... competing claims of irreparable hardship is, however, the traditional function of the equity court, the exercise of which is reviewable only for abuse of discretion."

Locomotive Engineers v. M.-K.-T. R. Co., 363 U.S. 528, 535 (1960).

Appellee respectfully submits that the record before the Court contains ample evidence to support the District Court's action in enjoining appellant from further collateral attack upon its jurisdiction as a Court of Bankruptcy. The discretion of the District Court was soundly and judiciously exercised. That exercise of discretion should not be disturbed. The order of the Court below should, we submit, be affirmed.

POINT II

THE JURISDICTION OF A COURT OF BANKRUPTCY EXTENDS TO AND IS DEFINED BY THE PROPERTY OF THE ESTATE BEING ADMINISTERED

The District Court, sitting as a Court of Bankruptcy, exercises the limited jurisdiction conferred upon it under §2 of the Bankruptcy Act (11 U.S.C. §11). That includes jurisdiction to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto..." (11 U.S.C. §11[7]). By that grant of jurisdiction, and upon the adjudication of a bankrupt, all of the bankrupt's property, wherever located, is drawn to the jurisdiction of the bankruptcy court, Fish v. East, 114 F. 2d 177 (10th Cir. 1940), and the Trustee, upon appointment, succeeds to the bankrupt's title to and rights in that property as of the date of the filing of the petition (11

U.S.C. §110[a])). That jurisdiction over the bankrupt's property is sole, exclusive and non-delegable, (Pepper v. Litton, 308 U.S. 295 [1939]; Thompson v. Magnolia Co., 309 U.S. 478 [1940]), and may not be disturbed, limited or hindered by any other Court or forum without the express consent of the bankruptcy court. Thompson v. Magnolia Co., supra.

The bankruptcy court draws to its jurisdiction not only the property in which the bankrupt held title, but all property, regardless of title, of which the bankrupt had possession, and, with respect to such property, the Court of Bankruptcy then acquires sole and exclusive jurisdiction to determine all questions of title thereto. Ex Parte Baldwin, 291 U.S. 610 (1934); see also: Thompson v. Magnolia Co., supra.

Executive is presently in liquidation under the provisions of the Securities Investor Protection Act of 1970 (15 U.S.C. §§78aaa et seq.). The SIPA, by its terms, incorporates into the law governing Executives' liquidation all of the general rules of Bankruptcy Court jurisdiction set forth above. Section 6b(c)(1) of the SIPA provides that

"Except as inconsistent with the provisions of this Act and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 60e) of chapters I to VII,

inclusive, of the Bankruptcy Act as section 102 of chapter X would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive; ..." 15 U.S.C. §78fff (c)(1).

The fundamental rules of jurisdiction set out herein are far from "inconsistent with the provisions of [the SIPA]." Section 5(b)(2) of the SIPA itself directs that

"Upon the filing of an application [for an adjudication that customers of a securities broker are 'in need of protection' under the SIPA], the court to which application is made shall have exclusive jurisdiction of the debtor involved and its property wherever located with the powers, to the extent consistent with the purposes of this Act, of a court of bankruptcy and of a court in a proceeding under chapter X of the Bankruptcy Act." 15 U.S.C. §78eee (b)(2).

The District Court, in administering the SIPA liquidation of Executive, sits as a Court of Bankruptcy -- a court exercising fundamental in rem jurisdiction -- jurisdiction limited to and defined by the property which is in its actual or constructive possession. Both the alleged records sought and claimed by appellant in the SEC administrative proceeding and in the criminal proceeding in New Jersey, and the storage closet in which they were supposedly kept, were in the possession of the bankrupt. If appellant wishes to raise a claim of rights to either he must litigate that claim in the Bankruptcy Court -- the forum holding exclusive jurisdiction over the disposition of that property. The order of the District Court

here appealed does nothing more than recognize that principal of jurisdiction and require appellant to abide by its rule.

POINT III

THE COURT IN BANKRUPTCY MAY ENJOIN PROCEEDINGS IN OTHER FORUMS IN AID OF MAINTAINING ITS JURISDICTION

The Court of Bankruptcy, once vested with jurisdiction over a bankrupt's property, may then enter any order "necessary for the enforcement of the provisions of [the Bankruptcy] Act" (11 U.S.C. §11[15]), including orders in aid of the maintenance of its exclusive jurisdiction over that property. "To protect its jurisdiction from interference that court may issue an injunction." Ex Parte Baldwin, supra, 291 U.S. 610, 615 (1934).

In the leading case of Steelman v. All Continent Co., 301 U.S. 278 (1937), relied upon by the Court below in reaching the decision here appealed, the Supreme Court considered whether the bankruptcy court, though a court of limited jurisdiction, had the power to restrain further prosecution of suits pending in other Courts upon the ground that those suits might encroach upon its own exclusive jurisdiction over the bankrupt's property. Justice Cardozo, writing for a unanimous Court, affirmed not only the existence, but the very necessity of the use by the bankruptcy court of the injunctive power in preservation of its jurisdiction. Steelman, trustee for an

individual bankrupt, was there seeking to take possession of property nominally in the name of All Continent Co., a company in which his bankrupt held all of the outstanding stock, and to which he had contributed all of its capital, thereby divesting himself of a substantial portion of his assets, allegedly in fraud of his personal creditors. While the trustee's investigation was continuing, All Continent Co. had commenced an action in a District Court in a neighboring state in which it sought to quiet title in, and obtain possession of, certain stock certificates located in that District. Fearing that an adverse judgment in that proceeding might irreparably harm the estate by removing the stock certificates from the bankruptcy court's jurisdiction before it could rule on the question of title to All Continent's assets, the Court enjoined All Continent from proceeding upon its complaint.

The circumstances which faced the District Court here, were virtually identical to those found in Steelman. The property which Bertoli has here placed in dispute in the administrative and criminal forums is in the possession of the Trustee and the District Court. The District Court has enjoined Bertoli from taking actions in those other forums which, if pursued to conclusion, could operate to cloud the Court's entitlement to property already within its conceded and exclusive jurisdiction. As the District Court itself has noted, it

has done "no more than [enjoin] a 'suitor' to cease from 'misusing a jurisdiction ... and converting such misuse into an instrument of wrong.' [Steelman, supra] a 291." (Opinion of the Court below, at pg. 4).

The Court's power to act to prevent such embarrassment to its jurisdiction is fundamental. That power extends not only to courts of the federal government (see: Steelman v. All Continent Co., supra) but takes in all persons and entities whose actions might affect the administration of a bankrupt's estate, including the executive agencies of the federal government (see: Zook v. United States, 541 F.2d 220 [9th Cir. 1976]) such as the SEC. Here in actual fact, the District Court has not enjoined any forum or agency, it has only enjoined appellant -- a litigant in those forums. See: Steelman v. All Continent Co., supra. The order appealed says no more, in effect, than 'Mr. Bertoli, this Court's determinations of its jurisdiction are binding upon you as president of Executive and a party to this action. You may contest them here. You may appeal them here. But you may not re-litigate them before other courts.'

We respectfully submit that the District Court acted properly, and with full and appropriate power and restraint, by entering its order of injunction restraining appellant from contesting in other forums issues of what is and is not

estate property -- issues, the adverse determination of which (in action to which the Trustee is not a party) might interfere with or adversely affect the property of Executive and hence the fundamental jurisdiction of that District Court. In the absence of the stay embodied in the District Court's order appellant would be free to continue to disregard that Court's binding orders, and would continue his collateral attacks upon Bankruptcy Judge Galgay's order of July 16, 1975 (in which, as is more fully discussed in Point IV, infra, the Court below ruled, on notice to appellant, that all of the records located on Executive's premises were properly in the possession of the Trustee). If those issues of proprietary interest were permitted to be tried, to conclusion, before any forum other than the Bankruptcy Court, and in the absence of the facts which could be shown by the Trustee, who is not a party to the criminal or administrative proceedings, it is possible (though, frankly, we feel hardly likely) that the result could be rulings which might affirm some or all of appellant's contentions, thereby, in effect, "overruling" Judge Galgay's prior determinations and undermining the Trustee's rights to possession of, and the District Court's Jurisdiction over the bankrupt's records and office premises.

"All these embarrassments and obstacles will be removed at a single stroke if the bankruptcy court is free from vexatious interference in its task of

supervising and controlling the administration of the estate's assets." Steelman v. All Continental Co., 301 U.S. at 286-87.

The "single stroke" necessary to remove these obstacles from this proceeding was, and remains the entry of the order of injunction here appealed, with its direction, already obeyed, that the Trustee immediately take such proceedings as are appropriate, before the Bankruptcy Court, to properly determine the issues raised by appellant's claims. That order should be affirmed.

POINT IV

APPELLANT'S SUPPRESSION MOTIONS COLLATERALLY
ATTACK THE VALIDITY OF A BINDING ORDER OF THE
DISTRICT COURT, AND HIS ACTIONS WERE, FOR THAT
REASON ALSO, PROPERLY ENJOINED

On July 16, 1975, Bankruptcy Judge John J. Galgay ruled, upon application of the Trustee, made on notice to Bertoli and the counsel for his various corporations, that all of the records of the "Dopler & Co." predecessors of Executive were the Trustee's property, and that all of the records located on Executive's premises were properly in the Trustee's possession.* Bertoli, though he had the fullest possible notice of the Trustee's application, did not appear at the hearing of that motion. He has not, in the over two years

* Moss affidavit, Exhibit E.

since, attempted to appeal or vacate that order. He has merely attacked its validity before the SEC Administrative Law Judge, and sought to impress that officer with a contention that that order was wrong, is invalid, and was obtained by some imagined "fraud" practiced by the Trustee upon the Court* and that he, Bertoli, owns all of the papers located in the 11th floor storage closet used by Executive. In total disregard of Judge Galgay's prior findings and the admitted fact that many cartons of "Dopler" records were stored in that room, Bertoli has stated, in a sworn affidavit to the Administrative Law Judge, that "the eleventh floor storage room...had no records of Executive within."**

The Bankruptcy Court's order of July 16, 1975 is binding upon appellant, and must be obeyed and abided by until such time as it is modified or vacated by the Court from which it was issued. See: Backo v. Local 281, United Bro. of Carpenters & Joiners, 308 F. Supp. 172 (S.D.N.Y. 1969), aff'd 438 F.2d 176 (2nd Cir. 1970), cert. den. 404 U.S. 858 (1971).

Under the circumstances of this matter, we respectfully submit that it was both proper and necessary for the District Court to enjoin appellant from further disregard of

* See: Transcript of hearing before the District Court on August 1, 1977, at pg. 11, lines 7-20.

** Moss affidavit, Exhibit C at ¶J thereof.

its lawful orders, and from further prosecution of the issues raised in his suppression motions which collaterally attack the validity of those orders. The order appealed from should be affirmed.

POINT V

THE DISTRICT COURT'S INJUNCTION
HAS NOT VIOLATED ANY OF APPELLANTS'
CONSTITUTIONAL RIGHTS

The order of the District Court has enjoined appellant from re-litigating in forums other than the Bankruptcy Court that Court's determination of the issues of what property was owned by and/or properly in the possession of Executive and, therefore, its Trustee. Appellant had chosen as the vehicle for his collateral attacks on the Bankruptcy Court's orders his motions for suppression of evidence in the administrative and criminal proceedings in which he is currently involved. He therefore raises the claim that the District Court's injunction, by limiting the scope of what he might contest in those motions, has somehow violated his rights under the U.S. Constitution, most notably, his Sixth Amendment right to a "fair trial". His claims lack both merit and substance.

The District Court's Order Does Not Violate
Appellant's First Amendment Right of Free Speech

Appellant claims that the order of the District Court must be vacated since, by prohibiting him from speaking to the

issues he raises of whether he or Executive owned or had possession of certain records and premises his rights to "free speech" under the First Amendment have been improperly curtailed. He is incorrect. No constitutional right, including that of "free speech" is absolute. As with all others, the right to "free speech" belonging to any one person is subject to modification for the protection of the co-relative rights of others that might be invaded by "too-free speech." See: In Re George F. Nord Bldg. Corp., 129 F.2d 173 (7th Cir.1942) cert. den. sub nom Kausal v. 79th and Escanaba Corp. 317 U.S. 670.

Appellant's claim, reduced to its simplest terms, is that the District Court, by acting to preserve its own jurisdiction and protect, against collateral assault, its own prior orders and rulings, has in some fashion violated appellant's First Amendment rights of "free speech". Appellant's construction, however, would appear to require a finding that the entire doctrine of res judicata, and the rules of "subject matter jurisdiction" are also unconstitutional restraints upon a litigant's ability to present his claims. Clearly, they are not. A litigant has the right to present his claim (and the District Court's order preserves that right to appellant, subject only to the restriction that claim be made in the Bankruptcy Court -- the only forum with proper subject matter

jurisdiction over these controversies in bankruptcy). But, that "right" is only to present that claim once, and only in a forum which is competent to determine the issues raised. The rules of res judicata and the exclusivity of Bankruptcy Court jurisdiction are established to further the effective and efficient administration of justice. See: Steelman v. All Continent Co., supra, 301 U.S. 278 (1937). The effective and efficient administration of justice is an interest possessed by society which is of such strength that when an individual's conduct is shown to present a clear and present danger of obstructing or impeding orderly judicial process, the general interest becomes paramount, and the offensive conduct may be restrained. See: Bridges v. California, 314 U.S. 252 (1941). The District Court has found appellant's collateral attacks upon its jurisdiction to pose such a clear and present danger to its administration of Executive's estate, upon which finding the order of injunction restraining appellant from further collateral attack has been entered.

Indeed, it is far from clear that appellant even has a right to "free speech" with respect to the claims he seeks to present to the administrative and criminal forums.

"The First Amendment was designed to aid and support the existence of a democratic society by preserving, free from interference, an unlimited marketplace for the interchange of ideas. See the dissent of Mr. Justice Holmes in Abrams v. United States, 250 U.S.

616, 624, 630, 40 S. Ct. 17, 63 L.Ed. 1173; Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L.Ed. 430. But the dissemination of ideas is not involved in the instant case." Halstead v. Securities and Exchange Commission, 182 F.2d 660 at 668 (D.C. Cir. 1950) cert. den. 340 U.S. 834.

The District Court's order does not limit or control what appellant may say, or even prevent him from direct attack, before the Bankruptcy Court, of that Court's prior orders -- it only limits the place where and the manner in which he may make those attacks. Appellant may contend, to any extent he sees fit, that the Trustee is not in proper possession of Executive's records or premises -- but he may only so contend before the Bankruptcy Court. He may attack that Court's orders, but he may not collaterally attack them before other forums. The District Court's order is properly limited and specific. An order of injunction, entered by a Court of Bankruptcy, prohibiting the president of a corporate bankrupt from prosecuting collateral legal actions which might interfere with the orderly liquidation of the bankrupt does not deny that person any cognizable right of free speech. Dealtry v. Posse School, Inc., 100 F.2d 470, 473 (1st Cir. 1938).

In sum, "free speech" is simply not an issue here. What is at issue are perfectly proper rules, of long standing, as to in rem jurisdiction, subject matter jurisdiction and the prohibition of improper collateral attack upon final and binding

judicial decisions. The District Court's order was proper, and should be affirmed.

The District Court's Order Does Not Violate
Appellant's Fourth, Fifth or Sixth Amendment Rights

Appellant also claims that, because his chosen vehicles for his collateral attacks upon the extent of the bankrupt's estate are motions to suppress evidence in administrative and criminal proceedings, the District Court's order will act to deny to him his constitutional rights to due process and to a fair trial. This claim, also, lacks legal merit.

Appellant is enjoined from collateral attack upon the orders and determinations of the Bankruptcy Court which brought into its jurisdiction the property of Executive, and is enjoined from seeking collateral determination of the nature and extent of that property.

"The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, see Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) and certainly does not establish any right to collaterally attack a final judgment of conviction."
United States v. MacCollom, 426 U.S. 317 at 323 (1976).

If the Due Process clause does not guarantee a right to collaterally attack criminal judgments, it is difficult to imagine it hiding within itself such a right with respect to the civil judgments of a Court of Bankruptcy. And, if that clause does

not guarantee a right to collaterally attack criminal judgments of conviction, it can hardly guarantee appellant the right to relitigate civil judgments in the context of preliminary motions to determine whether or not evidence will be admissible in a proceeding which might eventuate in a criminal conviction. Appellant does not possess the due process right which he posits to have been violated, and, since the order of the District Court, by enjoining collateral attack upon its jurisdiction, does not deprive appellant of any cognizable due process right, his consequent inability to mount such a collateral attack cannot deprive him of any aspect of a "fair trial" under the Sixth Amendment to the Constitution. The "fair trial" rights granted appellant by the direct and specific language of the Sixth Amendment are those of a "speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense." None of these express rights is in any way affected by appellant's inability, under the District Court's order, to litigate and relitigate title to property in the bankrupt's possession in forums outside of the Bankruptcy Court. The implied Sixth Amendment right of Fifth Amendment Due Process is likewise unimpaired. Appellant's claim to a

constitutional infirmity in the order appealed lacks all legal merit. The order of the District Court should be affirmed.

POINT VI

APPELLANT IS SUBJECT TO THE JURISDICTION
OF THE BANKRUPTCY COURT WITH RESPECT TO
THE ISSUES HE RAISES OF PROPRIETARY
INTEREST IN ESTATE PROPERTY

Appellant objects to the District Court's order because it requires him to submit his claims to the bankrupt's property to the Bankruptcy Court -- a forum to whose jurisdiction, he says, he is not subject. This contention of immunity from that Court's jurisdiction is so frivolous it can barely be said to be raised with any intent even approximating "good faith".

Appellant is the president of Executive, the District Court's bankrupt. As such an officer, he must "perform the duties imposed upon the bankrupt" under the Bankruptcy Act (11 U.S.C. §25[b]), which duties include the obligation to "comply with all lawful orders of the court" (11 U.S.C. §25[a][2]). One of those "lawful orders" was the order of Judge Tenney, on February 14, 1975, that commenced Executive's liquidation and bound to the Bankruptcy Court's exclusive jurisdiction all of the properties in Executive's actual and constructive possession. Furthermore, appellant, through a number of corporations

and purported corporations of which he admits to being president, has made formal claim against the Estate for the return of certain portions of that property alleged to belong to them. Appellant himself signed those claims as an officer of those corporations. Among such property are the books, records and premises in question.

The Bankruptcy Court proceeding envisioned by the order of the District Court (and, in fact, already commenced by the Trustee, and concluded) is one within the summary jurisdiction of that Court. The Bankruptcy Court's summary jurisdiction extends to all controversies concerning property in its or its Trustee's actual or constructive possession. 2 Collier, Bankruptcy, ¶23.04[2] (14th Ed.). Appellant admits that the property whose title he has placed in dispute is in the present possession of the Trustee, and thereby admits the propriety of the Bankruptcy Court's jurisdiction.

Since the action which the District Court's order directed to be commenced is properly within the Bankruptcy Court's summary jurisdiction appellant (subject, of course, to proper service of process, which was, in fact, effected) is within that Court's personal jurisdiction. Consent, by the defendant, to the Bankruptcy Court's summary jurisdiction is only needed if the property in controversy is in the actual possession of a person other than the Trustee. 2 Collier,

Bankruptcy ¶23.04[2] (14th Ed.). Appellant admits that the property in controversy is within the Trustee's present actual possession, and

"It is now settled that the bankruptcy court has power in a summary proceeding to adjudicate, without consent, controversies concerning the title to property the physical possession of which is in the actual or constructive possession of the trustee..." Magnolia Petroleum Co. v. Thompson, 196 F.2d 217, 222 (8th Cir. 1939) rev'd on other grounds 309 U.S. 478 (1940). [Emphasis supplied]

Appellant's claims to Executive's property are properly cognizable before the Bankruptcy Court, and both those claims and appellant, their proponent, are within its summary jurisdiction. The order of the District Court cannot be found invalid merely because it directs the Trustee to bring proceedings in the proper jurisdiction for determination of those claims, a jurisdiction which appellant has consciously and consistently attempted to avoid.*

POINT VII

THE DISTRICT COURT'S ORDER IS NOT
INVALID BECAUSE IT GRANTED RELIEF
MORE LIMITED THAN THAT INITIALLY
REQUESTED IN THE TRUSTEE'S APPLICATION

The Trustee's application to the District Court requested an order restraining appellant from proceeding to

* The Trustee could, of course, have commenced those proceedings of his own volition. The direction of the District Court is unnecessary to the jurisdiction of the Bankruptcy Court over that proceeding, and that directory paragraph of the District Court's order is, therefore, severable from the injunctive paragraphs therein.

prosecute his motion for suppression before the SEC Administrative Law Judge.* In granting the Trustee's application, the District Court narrowed the restraints imposed to only bar collateral prosecution by appellant of four specific issues which it found to be within its exclusive jurisdiction as a Court of Bankruptcy. Appellant conceives of this as a grant of relief not requested by the Trustee which, for some imagined reason, voids the order below. Appellant is far from correct.

Firstly, the relief granted by the District Court was exactly that requested by the Trustee. The application for relief and the Court's order speak for themselves, and, clearly, the general request of the application encompasses the specific restraints actually imposed.

Secondly, even if appellant's contention of variance were sustained by the documents, such variance would hardly be fatal to what is otherwise a proper and valid order of the Court. The District Court is not constituted by automators, devoid of discretion and capable only of reaction and never independent action. The Court is free and, indeed, has an obligation to independently review the positions of the parties to an injunctive proceeding, and, as a Court asked to grant

* That application was made on August 1, 1977. Appellant's suppression motion to the criminal forum was not filed until September 7, 1977. It did not exist to be considered at the time of the commencement of this proceeding.

equitable relief, to fashion the remedy which it deems appropriate, regardless of whether it fully meets, comes short of, or perhaps even exceeds the request of the petitioner. See: Arkansas Community Org. for Reform Now v. Brinegor, 398 F. Supp. 685, 699 (D.C. Ark. 1975) aff'd 531 F.2d 864 (8th Cir. 1976). Rule 65(d) of the Federal Rules of Civil Procedure requires only that an order of injunction be specific and set forth the basis for its grant. The District Court's order satisfies these requirements. As a Court of Bankruptcy, the District Court has broad power to "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement" of the Bankruptcy Act (11 U.S.C. §11[15]). The fact that the District Court, by limiting its restraint of appellant to certain specific actions, in conformance with the requirement of Fed.R.Civ.Proc. 65(c) and in pursuance of its powers and obligations as a court of equity, entered an order the language of which varied from that of the Trustee's request for relief should provoke commendation for a determination thoroughly and conscientiously considered. It can in no way detract from the validity of that determination.

POINT VIII

THE TRUSTEE'S APPLICATION
FOR INJUNCTIVE RELIEF IS
NOT BARRED BY LACHES

Appellant, in what is, literally, a two sentence point in his memorandum posits that "The SIPC Trustee has been aware for over 16 months of the suppression actions commenced by appellant. Any action to stay said proceedings have, therefore, been waived or barred by laches." (Appellant's Memorandum, Point IV, at pp.8-9). Appellant provides no legal support for his contention (indeed, appellant does not cite a single case or statute in his entire memorandum). He does not put forth any facts to justify a finding of prejudice to his position -- a necessary element of a claim of waiver or laches. See: Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 215 (1963) "The test of laches is prejudice to the other party." And, in all events, the Trustee could hardly be found to have waived rights in an administrative proceeding to which he is not a party, or be found to have been dilatory in seeking relief from the District Court where, as was shown to the Court below, it was not until a mere six weeks before the Trustee's application that the Administrative Law Judge announced that he would hear and consider appellant's collateral attack on these property questions, believing himself not to be bound by the Bankruptcy Court's determination of what property belonged

to its bankrupt's estate. This point by appellant is not and, in all events, could not be effectively raised, and must be dismissed as improper, and the order below affirmed.

POINT XI

APPELLANT'S MEMORANDUM CONTAINS
NUMEROUS INACCURACIES WHICH SHOULD
BE CORRECTED FOR THE RECORD.

Appellant's memorandum on this appeal contains numerous factual inaccuracies, as well as both indirect and direct statements attributing to the Trustee various possibly unethical intents and motives for his actions as Executive's Trustee. We request this Court's permission and indulgence while we here attempt, briefly, to correct the inaccurate record which appellant seeks to make. We apologize for what would otherwise be the unnecessary lengthening of this memorandum.

Appellant states that "On or about February 28, 1975, the SIPC Trustee placed Executive into Bankruptcy..." In actual point of fact and as this Court must know the Trustee did nothing of the sort. Executive was placed into Bankruptcy under the provisions of the SIPA on February 14, 1975 upon a finding by the United States District Court for the Southern District of New York that the customers of Executive were "in need of protection" under the SIPA.

Appellant states that the order of liquidation included only Executive and did not include his other companies such as Diversified Financial Services, Inc. and Paramount Leasing Corp. He further states that Paramount Leasing Corp. is a publicly owned company and, as such, has filed its required periodic reports with the SEC. Appellant, however, fails to disclose that neither Paramount Leasing Corp. nor Diversified Financial Services, Inc. exist, both having been dissolved not less than three years ago, by proclamation of the Governor of Delaware, their State of incorporation, for failure to pay the mandated corporate franchise taxes due under the law of Delaware.*

Appellant states that "an illegal search and seizure was conducted on premises rented to Diversified by agents of the government." Firstly, the statement of appellant is far from "fact." It is what he seeks and has, as yet, been unable to prove. Secondly, it is difficult to conceive how any premises could have been rented to Diversified, a corporation which did not legally exist.

Appellant states that a "prima facie case of illegal search was established on July 1, 1976" in the administrative

* See: Transcript of Hearing before the District Court on August 9, 1977, at pg. 13, line 4 to page 14, line 20.

proceeding before SEC Administrative Law Judge Max O. Regenstein. The record of that proceeding, however, does not disclose any such finding by the Administrative Law Judge.

Appellant offers, without support or authority, the proposition that the District Court, in issuing the order here appealed from, restrained appellant rather than the administrative forum itself on the basis that "there was no legal authority to stay the administrative proceeding." Section 2(15) of the Bankruptcy Act (11 U.S.C. §11[15]), however specifically grants to the District Court (indeed, not so much grants as confirms the existence of its traditional common law power) the authority to stay any proceeding, including those of co-equal Courts. Appellant clearly sees in the District Court's action a limitation which not only was not apparent to that Court, but, in fact, did not exist.

Appellant states that "the rent for the [11th floor] storeroom [at One Exchange Place] was paid by cashiers checks drawn on the Bank of North America or the Chelsea National Bank because Diversified had no bank account." He does not disclose that he has already stated, in a sworn affidavit to the United States District Court for the Southern District of New York, that Diversified also had no business, income or capital*, and

* Moss affidavit, ¶10.

that the monies which were converted into the cashiers checks to which he refers came directly, fully and solely from Executive's bank account.*

Appellant states that "no records of Executive were stored in said storage room and Executive did not use the room for any purpose." He does not tell this Court that, as he has already admitted, the storage room was used for the maintenance by Executive, and as required by statute, of the Dopler books and records, records which have already once been held by the Bankruptcy Court to be the property of Executive.

Appellant continues to argue that that order of Judge Galgay finding the Dopler records to be the property of Executive was granted "ex parte", though the record of this proceeding clearly shows that it was only granted after application for the order was made on written notice to appellant personally, to appellant's counsel and to the counsel for the several corporations and purported corporations which appellant now claims own those documents.

Appellant closes his "Statement of Facts" with the statement that "after 22 days of testimony and hundreds of exhibits, the ALJ made a preliminary determination that the storage room was not under the authority, custody of control

* Moss affidavit, ¶9, Exhibit H.

of the SIPC Trustee at the time of the alleged break-in(s)."

Once again, however, the record of that administrative proceeding fails to disclose the existence of any such finding by the Administrative Law Judge. Per contra, all that was said by the Administrative Law Judge, (and said only in June, 1977), was that the order of the Bankruptcy Court of July 16, 1975 would not be considered by him to be retroactive, and would not serve to preclude him, in his discretion, from hearing evidence which might go to the question of whether the Trustee had control of the storage room between the date of his appointment, February 14, 1975 and the date of the order, July 16, 1975.

Appellant, in Point I of his brief, asks to have this Court believe that he "has allowed the SIPC Trustee access to the records contained in said [11th floor] storeroom and has not demanded the return of said records." The record in this proceeding speaks otherwise. Appellant not only did not disclose to the Trustee, upon his appointment, the existence of that storage room but affirmatively removed from the premises and kept, to himself, at his house, the only keys to its door. Far from "allowing access" to that storeroom, it would appear that appellant willfully and knowingly withheld property of the bankrupt from the Trustee. The records in question are not in the custody of the Court "by agreement

between appellant and the Trustee" as appellant posits, but by operation of law and by order of the Bankruptcy Court.

In sum, appellant's submission to this Court is rife with conjecture, misstatement and half-statement. And it is these very misstatements which appellant now seeks the right to continue to bandy about in forums and in actions to which the Trustee is not a party and in which he has no right or effective ability to reply. Appellant speaks much of his supposed constitutional rights, while at the same time insisting upon his "right" to proceed in the forums of his choice, forums which, by his past actions, he has shown are only those where the Trustee does not possess the elemental right to confront appellant and put him to the proof of his charges and allegations.

The very nature of appellant's submission to this Court proves as clearly as any evidence could the potential irreparable harm to both the estate of Executive and the jurisdiction of the District Court as the Court of Bankruptcy overseeing and administering that estate which could result should the District Court's order of injunction be vacated and appellant left free to continue upon his announced and already commenced course of collateral attack upon that Court's orders. The order below should be affirmed.

POINT X

APPELLANT'S CLAIM OF THE NECESSITY
FOR AN "EVIDENTIARY HEARING" IS
SPECIOUS.

Appellant argues that, since the "facts" surrounding his allegations of proprietary interest in the property of Executive are in dispute the District Court erred in granting the Trustee's request for injunctive relief without holding an "evidentiary hearing". The argument confuses two separate issues.

The District Court had before it on the Trustee's application only the issue of whether appellant was taking actions properly enjoinable, that is, which could tend to embarrass, hinder or obstruct the administration of the Court's bankrupt's estate. There was no dispute as to the operative facts supporting the Court's determination that appellant was engaging in such activity. Appellant's own affidavit in opposition to the Trustee's application admits that he has made a motion for suppression to the administrative forum in which motion he claims "that Executive never occupied or used the 11th floor storage room," and that there were "no records of Executive...contained in said room."* The factual basis for the District Court's order of injunction was the mere fact that

* Bertoli affidavit, ¶7. See also: Moss affidavit, Exhibit C.

such statements were being made and such claims being pressed in forums other than the Bankruptcy Court having exclusive jurisdiction over the issue of the nature and extent of Executive's property. Whether those contentions were true or false, provable or not was not material to the Court's determination that such issues could only be raised before the Bankruptcy Judge overseeing the administration of the estate. Those factual disputes are material only to the determination to be made by that Bankruptcy Judge when the issues are presented to him.

CONCLUSION

Appellant's objections to the order of injunction of the District Court are without substance. He seeks, and asks this Court to grant to him the "right" to litigate and relitigate his absurd claims to Executive's property until, perchance, he reaches a forum which might in the absence of the Trustee (e.g., in a non-adversary proceeding in which only appellant's tales of entitlement would be heard) agree with some of his contentions. The issues of the extent of Executive's estate should be resolved somewhere, once and for all, but only once. Necessarily they will be resolved in some proceeding to which appellant is a party, and, properly, in a proceeding to which the Trustee, as representative of the Estate is also joined. The only result possible from the

issuance of the District Court's order and appellant's presumed obedience thereto will be the determination of those issues by a Bankruptcy Judge (rather than an administrative or criminal judge) in a proceeding to which Executive's Trustee is a party (rather than one in which he is not) and in the forum which has the sole and proper jurisdiction to decide those issues.

Unquestionably no "irreparable harm" can result from the determination of the truth before a proper forum in a proceeding between proper parties. The District Court clearly had the power to issue its order of injunction, and we respectfully submit, in view of the facts supporting that order it had a duty to protect its bankrupt's estate from appellant's continued collateral assault. The issuance of the order appealed was well within the District Court's discretion, a discretion which we submit was wisely and properly exercised, and, therefore, should not be disturbed by this Court. We respectfully request that the order appealed be, in all respects, affirmed.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for the Trustee-Appellee

Of Counsel

Eric H. Moss

August 19, 1977

BY HAND

Hon. Charles H. Tenney
Judge, United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Securities and Exchange Commission v.
Executive Securities Corporation
Dkt. 75 Civ. 733

Dear Judge Tenney:

We have received the proposed counter-order and cover letter submitted by Richard O. Bertoli upon the Trustee's application for injunctive relief recently heard by the Court in this matter. With respect to the order which Mr. Bertoli submits, we note only that it fails to set forth the full relief which we believe was granted the Trustee by the Court's rulings upon the record of August 9, 1977. The order submitted by Mr. Bertoli, if signed, would only stay respondents from seeking the return of documents from the Trustee in forums other than the Bankruptcy Court. Mr. Bertoli's proposed order omits any reference to the other issues raised by him in his suppression motion to the administrative forum, and, therefore, would, if signed, leave respondents free to continue to litigate in the SEC the Trustee's title to Executive's offices at

August 19, 1977

One Exchange Place, Jersey City, New Jersey, and his title and rights to possession of the various documents and records which were located therein. Indeed, under Mr. Bertoli's proposed order, those issues would, by their absence, appear to be matters excluded from this Court's exclusive jurisdiction. This proposed order would for that reason, stand in direct conflict with the Court's actual rulings as we understand them to be. This proposed order is improper, and we respectfully submit should not be signed. We respectfully request that the Court enter the Trustee's proposed order as previously submitted as its order herein.

Mr. Bertoli, in his cover letter to his submission, raises certain challenges to the validity of the Trustee's proposed order to which we feel obliged to reply.

(1) Mr. Bertoli objects that the order submitted by the Trustee would, if entered, violate his rights of free speech under the First Amendment to the United States Constitution. His claim is legally insubstantial. An order of injunction, entered by a Court of Bankruptcy, prohibiting officers of the bankrupt from interfering with the orderly liquidation or reorganization of their company does not deny them any right of free speech. Dealtry v. Posse School, Inc., 100 F. 2d 470 (1st Cir. 1938).

See also: In Re George F. Nord Bldg. Corp., 129 F2d 173 (7th Cir. 1942) cert. den. 317 U.S. 670.

(2) Mr. Bertoli complains that the Trustee's proposed order would violate his rights under the Fifth and Sixth Amendments by depriving him of his opportunity to move for suppression of evidence in the administrative proceeding now pending before Judge Regensteiner, in a related proceeding before Judge Owen of this Court, and in the criminal proceeding now pending before Chief Judge Whipple in the District of New Jersey. His objection is unfounded since it is based upon a misconstruction of the relief requested by the Trustee. Administrative Law Judge Regensteiner, Judge Owen and Judge Whipple all retain jurisdiction to hear Mr. Bertoli's suppression motions, and, under

the Trustee's proposed order, Mr. Bertoli retains the right to make such a motion in any forum that he may choose. The resolution of any such motion requires, however, as the foundation upon which to fit and determine the law, the proof of certain relevant facts, including among others the movants' ownership or rights to possession of the property allegedly search or seized. Since Mr. Bertoli's and Mr. Averell's motions relate to property over which the Trustee has in the past and continues to exercise control, the facts of ownership and right to possession can be determined only in the Bankruptcy Court. Once those determinations are made in that Court, then (and this, as we perceive it, is the sole effect of the Trustee's proposed order), those facts, as so determined, must be submitted, without contest, to Judge Regensteiner, Judge Owen, Judge Whipple and all other judicial officers hearing any of respondents' suppression motions. Based upon those determined facts, and any other relevant facts outside of this Court's jurisdiction, which they may find, it is then the province and jurisdiction of those Judges to decide the motions for suppression made before them and based upon and without contesting those determined facts, it is respondents' right to argue in favor of suppression. The Trustee's proposed order would not deprive respondents of the right to seek suppression of evidence in other forums. It would merely require that respondents, in attempting to achieve suppression, not seek to disurb the Bankruptcy Court's prior findings concerning the Trustee's title to and possession of Estate property.

(3) Mr. Bertoli claims that the Trustee's sole right is to be heard prior to any other forum's issuing of an order directing a turnover to respondents of books and records. He flatly states that the Trustee has absolutely no right to contest the submission of evidence which would prove that his application to Judge Galgay was fraudulent; that he in fact had no interest in the 11th floor storage room; that his counsel perjured himself; that he lied in correspondence

and oral conversations." The absurdity of this assertion is highlighted by the fact that it follows immediately after Mr. Bertoli's claim in that same letter to his own presumed rights under the constitution. Mr. Bertoli has repeatedly accused both the Trustee and his counsel of acts both bordering on and equaling criminal wrongdoing, but notably, he has consistently refrained from making such accusations in any proceeding to which the Trustee is a party (except, of course, in this matter when, in the cause of his own personal defense, he has told this Court of the accusations which he is making in other forums). He now states to this Court that he perceives it as his right to continue such conduct without affording the Trustee his right to "[confront] the witnesses against him" and be heard in defense of his own good name and character.

(4) Mr. Bertoli complains that the Order of Bankruptcy Judge Galgay is not binding upon him since it was entered "ex-parte" and without proper jurisdiction over respondents. The order, however, sought to affect only property and respondents' interests (if any) therein. The Court's power to enter that order rested, therefore, upon jurisdiction over the property in question, not the persons of respondents. Further, as Mr. Bertoli and the Court know, that order was entered "ex parte" only in the sense that Mr. Bertoli, who was given full notice of the Trustee's application, both personally and through his counsel, chose to ignore those proceedings and permit the order to be entered upon default. Mr. Averell was not given notice of that proceeding since it was not until a year later, in June 1976 that he disclosed to anyone that his personal records were allegedly on Executive's premises. Yet, even lacking such notice, it is fundamental law that an order of the Bankruptcy Court respecting the Trustee's ownership and possession of property is binding on all persons, regardless of notice, subject only to a right to have that order set aside by the Court from which it was issued. That right is preserved to Mr. Averell by the express terms of the Trustee's proposed order.

(5) Finally, Mr. Bertoli alleges that, as an "adverse party," the proceedings before both Judge Galgay and this Court were defective and had in the absence of proper jurisdiction, since they were not commenced by summons and complaint. He is,

however hardly an "adverse claimant" to the estate's property as that term is intended in §23 of the Bankruptcy Act (11 U.S.C. §46). The status of an "adverse claimant" is accorded to those who have possession of the bankrupt's property (2 Colliers, Bankruptcy ¶23.06[1]). The property in question has, however, been, and continues to be in the Trustee's possession. Even leaving aside the question of possession an "adverse claimant" must present a claim for retention of the property which in some way exceeds the de minimus standard of "colorable" (Id.).. Mr. Bertoli's claims hardly reach that level. He asserts that Diversified Financial Services, Inc., a non-existent, non-functioning subsidiary of Paramount Leasing Corp., a dissolved corporation, had rights to Executive's storeroom superior to Executive's, and that DLR Securities Corp. (formerly Dopler & Co., Inc.) had title to its old records despite the fact that it had earlier sold all of its assets, without exception, to Executive, and had informed the Securities and Exchange Commission, at the time of that sale, that its books and records were then being transferred to the custody and control of Executive.

Mr. Bertoli's objection to this Court's jurisdiction to enter its instant order is ill founded, further, since Mr. Averell has consented to this Court's jurisdiction by his general appearance for the argument of this application, and, since this proceeding was commenced against Mr. Bertoli by the service upon him of a summons and complaint on February 14, 1975. That complaint requested injunctive relief against interference with Executive's estate, to which injunction Mr. Bertoli has consented. The Court's present order merely reaffirms the direction in its earlier order in this matter that "during the period of this trusteeship defendant Executive Securities Corporation and its officers, directors, shareholders and employees, are hereby restrained from directly or indirectly transferring, setting off, receiving, retaining, changing, selling, pledging, assigning or otherwise disposing of or withdrawing

Hon. Charles H. Tenney

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any assets or property owned, controlled or
in the possession of said defendant...."

This Court has clear and complete jurisdiction of
respondents and of the issues raised by the Trustee's
application. The Trustee's proposed order does not violate
any rights which respondents may legitimately have. That
order should be signed and entered by this Court as its
order in this proceeding.

Thank you for your attention to this matter.

Respectfully,

Eric H. Moss

EHM:pb

cc:

Leo Gitlin, Esq.
Mr. Richard O. Bertoli
Securities and Exchange Commission
Securities Investor Protection Corporation

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing Brief to be served upon each of the following respectively by depositing same in the United States Mail, this 14th day of November, 1977:

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